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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RICK FIELDS,

Plaintiff and Appellant,

v.

TOD RATFIELD et al.,

Defendants and Respondents.

A132766

(Contra Costa County
Super. Ct. No. C09-01125)

Plaintiff Rick Fields filed an action for legal malpractice and breach of fiduciary duty against defendants, who acted as his attorneys in prior litigation. He has taken this appeal from an order granting defendants' motion for summary judgment and dismissing the action. Plaintiff argues that the trial court erred by denying him a continuance of the summary judgment hearing to present expert testimony, and claims triable issues of fact remain to be litigated in his causes of action for legal malpractice and breach of fiduciary duty by defendants. We conclude that the denial of plaintiff's request for a continuance was not an abuse of discretion, and defendants have negated elements of plaintiff's causes of action. We therefore affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The current legal malpractice action had its genesis in prior litigation between Rebecca and Rick Fields and defendants Grace Young and Walter Young, and Maestro's

Ristorante of San Ramon, Inc. (Contra Costa County Super. Ct. No. C97-05176.)¹ In 1997, the Fields owned and operated a comedy club in San Ramon known as Tommy T's. The Tommy T's club was a successful enterprise that offered accomplished professional comedians, had an accumulated reserve of valuable contacts, business relationships and comedy club expertise, a large and loyal customer base, and earned growing revenues, but the corporation through which the Fields operated Tommy T's, known as Bugs & Boof, Inc. (Bugs & Boof), was in Chapter 11 reorganization proceedings due to substantial capital debts incurred primarily in connection with leasehold improvements.² The Youngs owned two Maestro's restaurants, one located in Pleasanton, the other in San Ramon, within a mile of Tommy T's.

On June 11, 1997, while the Fields were still in the process of negotiating the Chapter 11 reorganization plan for Tommy T's, the parties entered into a business purchase and sale agreement (the Agreement) to unite their two businesses, with the ostensible objective of improving revenues without increasing overhead expenses. Under the Agreement, Tommy T's ceased to exist and the reorganization plan was abandoned. Rebecca alone purchased a one-third interest in the real property on which Maestro's was located at 2323 San Ramon Valley Boulevard in San Ramon, and a one-third interest in the business and profits of Maestro's, in exchange for, among other consideration, payment of specified sum in promissory notes and cash, termination of Tommy T's and the transfer of the business to Maestro's, including the customer lists, business name, marketing skills and booking expertise, along with Rick's best efforts to convert the Chapter 11 reorganization proceeding to a Chapter 7 liquidation of the Tommy T's

¹ For the sake of clarity and convenience, we will refer to Rebecca Fields and Rick Fields collectively as the Fields and individually by their first names; we will also refer to Rick as plaintiff in the present case. Similarly, we will refer to Grace Young and Walter Young collectively as the Youngs and individually by their first names; we will refer to Maestro's Ristorante of San Ramon, Inc., as Maestro's. Much of our recitation of the underlying facts is taken from unpublished opinions in two appeals taken from judgments in the prior litigation between the Fields as plaintiffs and the Youngs and Maestro's as defendants (*Fields v. Maestro's Ristorante of San Ramon, Inc.* (May 31, 2006, A109130) [unpub. opn.] and *Fields v. Maestro's Ristorante of San Ramon, Inc.* (May 20, 2005, A102857) [unpub. opn.]).

² Bugs & Boof was jointly owned by Rebecca and her father. Rick did not own any portion of the corporation.

business. The Fields became salaried employees of Maestro's, with general responsibility for comedy and marketing. Rebecca was given the title Assistant General Manager; she was also appointed to serve as a director, second vice president and secretary of the corporation.

Despite the initial success of the new comedy business at Maestro's, disagreements arose between the parties, and their relationship irretrievably deteriorated. The Fields learned that the Youngs failed to properly record or account for cash ticket purchase transactions, and did not provide an accounting. The employment positions of the Fields were downgraded, and their responsibilities were reduced. The Youngs neither performed the necessary inventory nor prepared the promissory note for Rebecca to sign to make her projected one-third contribution to the business; they never performed the necessary real estate appraisal or prepared the promissory note for Rebecca to execute for her purchase of one-third of Maestro's property; and never made any effort to transfer one-third of the shares of Maestro's to the Fields. The Fields arrived at the conclusion that the Youngs were trying to exclude them from the business, and indeed never had any intention of making them partners in the first place. They decided to terminate their relationship with the Youngs.

On December 12, 1997, defendant Tod Ratfield, acting as attorney for the Fields, sent the Youngs a "Notice of Rescission," which rescinded the Agreement in total, on specified grounds of misrepresentation of material facts, promises made without intent to perform, and failure of consideration through breach of contract. The Fields offered to return all consideration tendered to them by the Youngs, on condition that the Youngs restore Rebecca "to the position she was in prior to June 11, 1997, in business as Bugs & Boof, Inc., dba Tommy T's, with all of the trade fixtures, inventory, data base, and operating capital, etc., in substantially the same condition as when given," with an assigned value of \$1.5 million.

The Youngs accepted the rescission through their attorney by letter dated December 16, 1997, and offered to restore all consideration received from the Fields, subject to off-sets for damages assertedly caused by the conduct of both Rick and

Rebecca. The Youngs also gave the Fields notice of their rescission, based on fraud, failure of consideration and breach of contract by the Fields. In light of the mutual rescission of the Agreement, the Youngs disputed the right of Rebecca to claim any interest in the property of the Maestro's business. After rescission and the termination of the parties' business relationship, the Youngs continued to present live comedy at Maestro's until the business closed at the end of May 2001.

In December 1997, defendant Ratfield filed a complaint on behalf of the Fields against the Youngs, alleging causes of action for breach of the June 11, 1997 Agreement, rescission, fraud, infliction of emotional distress, defamation, involuntary dissolution, and breach of fiduciary duty.³ The Youngs subsequently filed a cross-complaint which alleged similar causes of action against the Fields.

Rebecca also filed a sexual harassment action against Walter, which she ultimately voluntarily dismissed. In response, Walter filed a malicious prosecution action against Rebecca, which was defended by her insurer Farmers Insurance Company (Farmers). Against the recommendation of Ratfield, Rebecca accepted a policyholder buy-out and release from Farmers in the amount of \$17,500. Ultimately, Walter's malicious prosecution action was also dismissed pursuant to a negotiated settlement. The Fields also negotiated a policyholder buy-out and release of \$70,000 from Farmers on the Youngs' cross-complaint, which was applied primarily to unpaid attorney fees owed by the Fields.

By September of 1999, a dispute between the Fields and defendant Ratfield resulted in his withdrawal from representation of the Fields in the underlying action, and the retention of defendant David Hornsby, and the law firm of Del Baccaro, Hornsby and Blake as their attorney.

Before trial of the underlying action, the trial court ruled that the mutual rescission of the Agreement by the parties extinguished the Fields' causes of action on the contract and for fraud. Consequently, evidence in support of damages for the fraud and contract

³ The complaint also sought reasonable attorney fees. The litigation between the Fields and the Youngs will be referred to as the underlying action.

causes of action was excluded as not relevant. The court further ruled that the Fields were precluded from introducing evidence of the value of Bugs & Boof or Tommy T's, because that corporation and business were in the possession of the bankruptcy trustee at the time the parties negotiated the Agreement. Therefore, the Fields were not entitled to the ongoing value of the business they did not then own. To avoid unjust enrichment to the Youngs the court ruled the Fields were entitled to recover "the value of what they brought to this agreement," – including, their personal and business "know how," "business contacts," and unique information and cooperation in the creation of comedy business at Maestro's – and that "the most direct method of assessing this value" was evidence of "the actual profits made" by the Youngs as a result of the Agreement with the Fields.

The underlying action proceeded to jury trial in November of 2002. The jury returned a verdict in favor of the Fields on their complaint, based on findings in the special verdict form that they had contributed and the Youngs had received valuable benefits pursuant to the Agreement. As the value of their contribution to the business, the jury awarded the Fields \$57,606 for cash payments, \$25,000 for personal employment services performed by Rebecca, and \$1 million in profits earned by Maestro's comedy club business. The jury reached a defense verdict in favor of the Fields on the Youngs' cross-complaint.

On May 9, 2003, the trial court denied the Youngs' motion for judgment notwithstanding the verdict, but issued a conditional order, pursuant to Code of Civil Procedure section 662.5, subdivision (b), granting their motion for a new trial subject to the condition that the motion was denied if the Fields consented to a reduction of the award of unjust enrichment profits from \$1 million to \$333,333, representing one-third of the total profits from the business. On October 16, 2003, the Fields consented to the reduced award of unjust enrichment profits, and accepted the remittitur. The Fields' request for an award of attorney fees and costs was deferred and taken under submission. The judgment was affirmed on appeal by the Youngs from the judgment and order

denying their motion for judgment notwithstanding the verdict. (*Fields v. Maestro's Ristorante of San Ramon, Inc.* (May 20, 2005, A102857) [unpub. opn.])

While the first appeal from the judgment in the underlying action was pending, the trial court ruled on Fields' motion for attorney fees and costs. In an order filed on January 10, 2005, the court determined that the Fields were entitled to attorney fees under Civil Code section 1717 as prevailing parties in the underlying action, and awarded interest on the fee award from October 16, 2003, the date they accepted the remittitur on the underlying judgment. The matter was continued to allow the Fields to file supplemental documentation in support of their request for attorney fees. In an order filed on June 7, 2005, the trial court awarded the Fields attorney fees in the principal sum of \$965,328.96, plus \$135,329.92 (representing a 10 percent surcharge of the total monetary award), together with interest as of June 7, 2005.

The Youngs filed a second appeal from two postjudgment orders, challenging the award to respondents of approximately \$1.1 million in attorney fees incurred in the underlying litigation, with interest on the fee award from October 16, 2003. This court affirmed the orders on appeal.

Thereafter, the Fields, primarily through their attorneys, engaged in only partially successful postjudgment collection efforts. The Youngs' insurance carrier determined that they were not covered for the rescission and unjust enrichment claim, so no indemnity was available from the carrier. Defendants were unproductive in efforts to obtain funds to satisfy the judgment from the sale of the Youngs' residence. By resorting to bonds and an appeal deposit posted by the Youngs, the Fields collected a total of approximately \$790,000, which left unrecovered over \$1 million, excluding interest. Much of the recovery was applied to payment of defendants' attorney fees in the underlying action. By April of 2008, with Fields' consent defendants withdrew as their attorneys in the underlying action. Thereafter the Fields, through their agents, attempted, but were not able to further satisfy the judgment.

The underlying action was thus finally concluded, but from it the present action ensued. Rick and Rebecca were divorced prior to the trial and judgment in the

underlying action, and Rick did not receive any of Rebecca's separate property in their dissolution action. On April 24, 2009, Rick alone filed a complaint for legal malpractice and breach of fiduciary duty against defendants. The first amended complaint, filed on October 5, 2009, is based on claims that defendants, as his attorneys in the underlying action, failed to exercise reasonable care and skill in the performance of legal services for him. Specifically, the pleading alleged the following negligent acts and omissions by defendants: negligent preparation and service of the notice of rescission on the Youngs, which thereby extinguished all causes of action other than unjust enrichment, and limited their potential recovery in the case; negligent negotiation with the Fields' insurance carriers; failure to timely file an abstract of judgment after the favorable jury verdict was rendered; and, failure to file a cross-appeal to challenge the remittitur.

After defendants' demurrer was overruled, defendants Ratfield and Hornsby filed answers and cross-complaints for breach of contract, declaratory relief, and for the reasonable value of legal services provided to Rick. Defendants also filed a motion for summary judgment and summary adjudication. The trial court determined that defendants met their burden of establishing no disputed issue of material fact in the professional malpractice and breach of fiduciary duty causes of action. The court found no evidence to support the claims that defendants negligently negotiated with the Fields' insurance carriers, negligently failed to timely file the abstract of judgment, or negligently failed to challenge the order granting the Youngs' motion for new trial and the remittitur. The legal malpractice cause of action based on defendants' alleged negligent preparation and service of a notice of rescission on the Youngs was found unsupported by proof of damages. The cause of action for breach of fiduciary duty was found negated by the evidence. Defendants' motion for summary judgment was granted, and judgment in favor of defendants was subsequently entered. Following a bench trial on the cross-complaint, judgment of an award of unpaid attorney fees was entered in favor of Ratfield and Hornsby. This appeal from the judgment on the complaint followed.

DISCUSSION

Plaintiff argues that the trial court erred by granting defendants' summary judgment motion and dismissing his action. He asserts that triable issues of fact exist as to the various grounds stated in support of his legal malpractice and breach of fiduciary duty causes of action.

Established summary judgment standards guide us in resolving this appeal. "A motion for summary judgment shall be granted when 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (Code Civ. Proc., § 437c, subd. (c).)" (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.) " "A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail." [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]" [Citation.]" (*MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1435.) "Where, as here, a defendant moves for summary judgment and the plaintiff bears the burden of proof by a preponderance of the evidence at trial on the issues that are the subject of the motion, the defendant initially 'must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not . . . ' [Citation.] More specifically, a moving defendant must make a prima facie showing that the plaintiff does not possess, and cannot reasonably obtain, sufficient evidence to establish at least one element of plaintiff's cause of action." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 506–507 (*Bushling*).)

Once a defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action, "the burden shifts back to the plaintiff to show that a triable issue of one or more material

facts exists as to that cause of action or as to a defense to the cause of action.” (*Moser v. Ratnoff* (2003) 105 Cal.App.4th 1211, 1217.) “If the court determines that the evidence presented by the plaintiff and all of the reasonable inferences drawn therefrom show one or more of the elements of the cause of action only as likely as, or less likely than, an absence of one or more of those elements, it must grant a defendant’s motion for summary judgment.” (*Bushling, supra*, 117 Cal.App.4th 493, 507.)

We must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549.) “We review orders granting or denying a summary judgment motion de novo. [Citations.] We exercise ‘an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.’ [Citation.]” (*MacKay v. Superior Court, supra*, 188 Cal.App.4th 1427, 1435.)

I. The Denial of Plaintiff’s Request for a Continuance.

Before we review the merits of the trial court’s summary judgment ruling, we confront plaintiff’s claim that his request to continue the summary judgment hearing was improperly denied. The record shows that defendants filed their motion for summary judgment on October 8, 2010, and received a hearing date of January 26, 2011. On January 13, 2011, plaintiff’s counsel, who had been recently retained, filed a motion for a continuance of the scheduled hearing date and an extension of time to obtain and present expert witness information. In support of the request, counsel declared that plaintiff obtained the funds to retain an expert on January 5th. The expert had reviewed materials related to the underlying action. Counsel expressed a belief that the expert was prepared to “submit to a meaningful oral deposition” and “express opinions favorable to plaintiff’s case” to be added to the opposition to the summary judgment motion. The trial court denied plaintiff’s motion on grounds that he failed to meet statutory requirements and

factually support the request. Plaintiff argues that he was entitled to a continuance to retain an expert , and denial of the motion to continue the hearing date “was an abuse of discretion.”

Section 437c, subdivision (h) provides in part: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.” A continuance of a summary judgment hearing is mandated upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. (*Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 167; *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) In a declaration filed in support of a request for continuance under section 437c, subdivision (h), “ ‘The nonmoving party seeking a continuance “MUST SHOW: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]” [Citation.]’ [Citation.]” (*Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1023.)

“Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court’s denial of appellant’s request for a continuance for abuse of discretion.” (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

The record fails to establish that plaintiff satisfied the requirements to mandate continuance of a summary judgment hearing under section 437c, subdivision (h). To obtain a mandatory continuance under the statute, “plaintiff was required to show, by affidavit, that facts essential to his opposition to the summary judgment motion existed, and the reasons why they could not be presented at the time of the motion.” (*Bushling, supra*, 117 Cal.App.4th 493, 511.) Plaintiff did not seek a continuance until 13 days

before the scheduled hearing on the summary judgment motion, and less than two weeks before the scheduled trial date of January 24, 2011. The action had then been pending for over 18 months, and in that time plaintiff had failed to procure or identify his expert witness during the discovery process. The affidavit of counsel did not explain the reason for plaintiff's failure to conduct the discovery necessary to present the opposition evidence by the time of the hearing. (*Bushling, supra*, at p. 512.) Counsel merely stated that 10 days before the request was filed plaintiff provided the funds for an expert witness retainer. A showing of discovery diligence, in the nature of an explanation of what efforts were made to obtain the evidence and why they were not undertaken earlier, is required by a party seeking relief under section 437c, subdivision (h). (*Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 191; *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 356–357.)

Further, plaintiff failed to demonstrate with any specificity that “ ‘facts essential to justify opposition may exist.’ ” (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.) The supporting affidavit vaguely stated that the expert believed he “can now express opinions favorable to plaintiff's case.” “The virtual mandate” of section 437c, subdivision (h), “presupposes a good faith showing that there are facts in opposition that may exist and a good faith showing why those facts could not have been presented at the time of the hearing.” (*Bushling, supra*, 117 Cal.App.4th 493, 512.) Plaintiff has made neither showing here, and denial of the motion to continue was not an abuse of discretion. (See *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 263, disapproved on another ground in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315.)

II. The Legal Malpractice Cause of Action.

We turn to an examination of the merits of plaintiff's legal malpractice action. “ ‘Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, causation, and damage. The elements of a cause of action for professional negligence are: (1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess

and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence.’ [Citation.]” (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 429.) “Summary judgment is appropriate if the defendant negates any of these elements.” (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.)

“In a typical professional negligence case against a litigation attorney, a determination of the merits of the underlying lawsuit must be made in order to adjudicate the elements of causation and damages. [Citation.] The plaintiff is required to prove that but for the defendant’s misconduct, ‘ “the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.” ’ [Citations.] ‘This method of presenting a legal malpractice lawsuit is commonly called a trial within a trial. It may be complicated, but it avoids speculative and conjectural claims.’ [Citation.]” (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 934.) Thus, for each claim of legal malpractice alleged by plaintiff, we must examine the underlying action against the Youngs to determine if defendants’ acts or omissions resulted in a less favorable judgment for him.

A. The Letter of Rescission.

Plaintiff’s first and primary complaint against defendants is that Ratfield failed to act with the skill, prudence, and diligence as a lawyer of ordinary skill and capacity by sending the Youngs a letter of rescission. Plaintiff asserts that by choosing the alternative remedy of rescission of the Agreement rather than initiating an action for breach of contract against the Youngs, Ratfield limited the Fields’ recovery to restitution of consideration and restoration of their former status – that is, as owners of Tommy T’s – and denied them a greater recovery of damages from the Youngs, which would have included partial ownership of the Maestro’s business and real property as specified in the Agreement.⁴ Plaintiff points out that the adverse affects of the choice of rescission were

⁴ In an action for rescission, a successful plaintiff may recover consideration given and any other consequential compensation necessary to make him whole, but is not entitled to recover the benefits he would have gained if the rescinded contract had been fully performed. (*Sharabianlou*

exacerbated by the failure of Ratfield to recognize that Tommy T's was then in bankruptcy, which meant that "Fields could not be restored to his position as owner of Tommy T's and all of the damages in connection with the loss of Tommy T's were not available to Fields in the rescission action," nor were "remedies under the Corporations Code," as the trial court in the underlying case determined. Plaintiff therefore claims, "It is without question that damages available to Fields on contract and Corporations Code remedies far exceeded the limited damages available under rescission."

We first note what the Fields recovered in the underlying action: the jury verdict in the rescission action awarded them \$57,606 for cash payments, \$25,000 for personal employment services performed by Rebecca, and \$1 million in unjust enrichment profits earned by Maestro's comedy club business, which was reduced by the trial court in the remittitur to \$333,333, representing one-third of the total profits from the business. Thus, the Fields recovered some of the damages available for breach of contract under an unjust enrichment theory.

Recovery of additional damages by Rick was entirely speculative. The undisputed evidence establishes that Bugs & Boof, the business entity that owned Tommy T's, was owned not by Rick, but jointly by Rebecca and her father. When the merger occurred, plaintiff owned no interest in Tommy T's or Maestro's. Under the Agreement, Rebecca alone, not Rick, was entitled to a one-third interest in the real property on which Maestro's was located and a one-third interest in the profits of the business. Defendants thus disproved plaintiff's right to recover damages under the Agreement, and in response he did not show that a triable issue of material fact existed as to *his* right to recover additional damages. Nothing in the record was presented by plaintiff to suggest an assignment of Rebecca's rights to Rick, or his right to her separate property interest in the shares of Maestro's. Plaintiff testified in his deposition that he did *not* receive any transfer of Rebecca's separate property interests.

v. Karp (2010) 181 Cal.App.4th 1133, 1146; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564.)

“To win a legal malpractice action, the plaintiff must prove damages to a legal certainty, not to a mere probability.” (*Slovensky v. Friedman, supra*, 142 Cal.App.4th 1518, 1528.) To show damages proximately caused by breach, the plaintiff must allege “ ‘facts establishing that, “but for the alleged malpractice, it is more likely than not the plaintiff would have obtained a more favorable result.” [Citations.]’ [Citation.] ‘Unless a party suffers damage, i.e., appreciable and actual harm, as a consequence of his attorney’s negligence, he cannot establish a cause of action for malpractice. Breach of duty causing only speculative harm is insufficient to create such a cause of action. [Citation.] “[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. [Citation.]” [Citation.]’ [Citation.]” (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509.) Here, according to the undisputed evidence, it is more likely than not that plaintiff would have failed to obtain a more favorable result if Ratfield had proceeded with a breach of contract action rather than rescission of the Agreement.⁵

B. The Collection Efforts.

Plaintiff also attributes malpractice damages to the failure of defendants to engage in adequate and successful efforts to collect the judgment from the Youngs. He particularly faults defendants for failing to obtain assets from the sale of “the Maestro’s land” by the Youngs before trial and judgment in the underlying action by securing a lis pendens on the property, failing to foreclose on the Youngs’ residence in 2006, before “real estate prices fell dramatically,” failure to discover and reach “over \$200,000 cash

⁵ We do not suggest, as defendants have argued, that Rick lacks “standing” to bring the present legal malpractice action due to the ownership of the Tommy T’s business entity solely by Rebecca and her father. As we read the record, Rick was a client of defendants and one of the prevailing parties in the underlying action against the Youngs. Attorneys owe a duty, and are answerable in malpractice, to the person who retained them and with whom they stand in privity of contract. (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 529.) The issue of standing was addressed below, and the trial court did not find that Rick’s malpractice action is in any way barred by lack of standing. While Rick has standing to pursue the present action, we find that proof of *his* recovery of *additional* damages – that is, a more favorable verdict – in the underlying case is speculative, particularly given his unsubstantiated interest in the business. We need not obtain any further briefing from the parties on the standing issue.

from the business” hidden by the Youngs, and failure to attach the Youngs “stocks and investments worth \$1M.”

The claim of negligent collection efforts fails due to the same infirmity as the allegation of the negligent pursuit of rescission: the lack of an adequate showing of damages. First, Rick was not in position to obtain or benefit from collection of funds from the sale of Maestro’s, as only Rebecca was granted a one-third interest in the property by the Agreement. The sale of the Youngs’ residence to satisfy the judgment was attempted by defendants in 2006 and 2008, but did not generate offers in excess of the mortgages and liens on the property. Plaintiff submits that attempts to foreclose on the residence in 2006 may have been successful if he had been informed of the requirement that he satisfy the homestead and first mortgage, but the ultimate success of a foreclosure or sale, and with it the demonstrated harm to plaintiff through loss of satisfaction of the judgment, is manifestly speculative. No admissible evidence indicates that the Youngs had additional assets, in the nature of investments or cash, to satisfy the judgment. The evidence fails to establish even the probability that damages to plaintiff resulted from ineffectual or negligent collection efforts by defendants.

C. The Failure to File a Cross-appeal.

Plaintiff argues that the failure of defendants to file a cross-appeal from the remittitur that reduced the judgment from \$1 million to \$333,333, presents “a triable issue of fact” of negligence. Plaintiff points out that in the Youngs’ first appeal from the jury verdict he was entitled to challenge the remittitur by cross-appeal. He maintains that in a cross-appeal he “could have argued” he was entitled to “100% of the comedy profits,” rather than only one-third of the \$1 million in profits earned by Maestro’s comedy club business.

Plaintiff’s claim that a cross-appeal in the underlying action may have been successful is contradicted by the record. First, reversal of the trial court’s conditional new trial order was problematic at best. The Agreement granted only Rebecca an interest in the business profits, and only a one-third percentage. Nothing in the record indicates

that the reduction in damages pursuant to the new trial order was an abuse of discretion.⁶ Plaintiff further admitted that the Fields had little money to finance an appeal and possible retrial of the underlying action, which was the primary reason they accepted the remittitur. The Fields were advised of the difficulties of obtaining reversal of the new trial order, and decided to forego a cross-appeal. The causation and damages elements of a successful legal malpractice action based on failure to pursue a cross-appeal are negated by the evidence. We conclude that the trial court properly granted summary judgment in favor of defendants on the legal malpractice cause of action. (*Slovensky v. Friedman*, *supra*, 142 Cal.App.4th 1518, 1527–1528.)

III. The Breach of Fiduciary Duty Cause of Action.

We turn to plaintiff's cause of action for breach of fiduciary duty, in which he claims that defendants violated rule 3-310 of the Rules of Professional Conduct, State Bar of California,⁷ by intentionally failing to perform legal services without competence. (See also *In re Sanders* (1999) 21 Cal.4th 697, 712.) He repeats his contention that Ratfield incompetently represented the Fields in the underlying action by advising them

⁶ “The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of “[e]xcessive . . . damages” or “[i]nsufficiency of the evidence,” [Code of Civil Procedure] section 657 provides: “[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence . . . or upon the ground of excessive or inadequate damages, . . . such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.” . . . Thus, we have held that an order granting a new trial under section 657 “must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court’s] theory.” [Citation.] Moreover, “[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached” [Citation.] In other words, “the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the [new trial] order.” [Citation.] [¶] The reason for this deference “is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.” [Citation.] Therefore, the trial court’s factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury’s factual determinations. [¶] . . . The trial court . . . is in the best position to assess the reliability of a jury’s verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons.” [Citation.]” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 386.)

⁷ All references to rules are to the Rules of Professional Conduct.

to seek rescission without cognizance of the damages implications due to the bankruptcy status of Tommy T's.

“To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages.” (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182.) Plaintiff demonstrated that defendants owed him a fiduciary duty as his counsel in the underlying action. (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 11.) As with the cause of action for legal malpractice, however, the plaintiff is required to prove that but for the defendant's breach of fiduciary duty “ ‘the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.’ ” [Citations.]” (*Gutierrez v. Girardi, supra*, 194 Cal.App.4th 925, 934.) Our conclusion that plaintiff cannot establish the elements of causation or damages in the legal malpractice action related to the decision to pursue rescission also defeats his breach of fiduciary duty cause of action.

Plaintiff also asserts that defendants committed a breach of fiduciary duty by violating rule 4-200, which prohibits charging or collecting illegal or unconscionable fees.⁸ The fiduciary duty owed by an attorney to a client “requires fee agreements and billings ‘ ‘must be fair, reasonable and fully explained to the client.’ ” No fee agreement ‘is valid and enforceable without regard to considerations of good conscience, fair dealing, and . . . the eventual effect on the cost to the client.’ Rule 4-200 (A) of the Rules

⁸ Rule 4-200 reads: “(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. [¶] (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following: [¶] (1) The amount of the fee in proportion to the value of the services performed. [¶] (2) The relative sophistication of the member and the client. [¶] (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. [¶] (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member. [¶] (5) The amount involved and the results obtained. [¶] (6) The time limitations imposed by the client or by the circumstances. [¶] (7) The nature and length of the professional relationship with the client. [¶] (8) The experience, reputation, and ability of the member or members performing the services. [¶] (9) Whether the fee is fixed or contingent. [¶] (10) The time and labor required. [¶] (11) The informed consent of the client to the fee.”

of Professional Conduct expresses this fiduciary requirement. It states: ‘A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.’ The Rules of Professional Conduct ‘are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of public policy to protect the public.’ ” (*Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430–431, fns. omitted.)

Plaintiff did not plead a violation of rule 4-200, nor has he sought to challenge defendants’ collection of attorney fees through the State Bar arbitration of the fee dispute, or other means. (See *Bird, Marella, Boxer & Wolpert v. Superior Court*, *supra*, 106 Cal.App.4th 419, 427.) While the total amount of attorney fees collected by defendants in the underlying action is vaguely mentioned, plaintiff has failed to make any showing of an unconscionable fee agreement with defendants. While the fees were substantial, the legal services provided to plaintiff were also valuable, given the complexity and extended duration of the litigation, and the partially favorable result obtained. Nothing suggests that the parties were in an unequal bargaining position, or that terms of the Agreement were not fully subject to negotiation. As far as we know, the Fields gave informed consent to the fee. (Rule 4-200(B)(11).) Nor can we discern that the terms were overly harsh or one-sided. The facts we can glean from the record do not suggest the fee agreement was unconscionable, either procedurally or substantively. (See *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 443; *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 22–23.) Summary judgment was properly granted.

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Margulies, J.